Petition

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81-1488
NO.

In The

Supreme Court of the United States

OCTOBER TERM 1981

ALASKA MARINE TRUCKING, a division of LYNDEN TRANSPORT, INC.,
Respondent,

v.

CARNATION COMPANY,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION I

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QUESTION PRESENTED

Whether a carrier's violation of credit regulations under the Interstate Commerce Act may estop it from collecting freight charges from a consignor.

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

The partially owned subsidiaries and affiliates of the petitioner are:

Bon Bon Company of America, Inc.
Carnation de Espana, S.A.
Carnation Philippines, Inc.
Laboratoires Vetochimie, S.A.
"Societe Civile Immobiliere" BEL AIR
Solis Industrias de Alimentacion, S.A.
Carnation Foods Company, Ltd.
Carnco Foods (Nigeria) Ltd.
Compania Dominicana De Alimentos Lacteos, S.A.
Distribuidora Exclusiva de Productos de Calidad, S.A.
Gloria, S.A.
Hasmin Marketing Corporation
Jamaica Milk Products Ltd.
Premier Milk (Malaya) Sdn. Bhd.
Premier Milk (Singapore) Pte. Ltd.
R and P Realty Company, Inc.
Sistemas de Transporte, S.A.
Societe Civile Immobiliere Du 74 rue de la Faisanderie

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v.

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Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION I

The petitioner Carnation Company respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Washington State Court of Appeals, Division I, entered in this proceeding on August 10, 1981.

OPINIONS BELOW

The opinion of the Washington State Court of Appeals is reported at 30 Wn. App. 144, 633 P.2d 105 (1981), and appears in the Appendix at A-1 to A-19. The Findings of Fact and Conclusions of Law of the Superior Court for King County, Washington, which have not been reported, appear in the Appendix at A-23 to A-30.

JURISDICTIONAL STATEMENT

The judgment of the Washington State Court of Appeals, Division I, was entered on August 10, 1981. A timely motion for reconsideration was denied on September 23, 1981. A timely Petition for Review was denied by the Washington State Supreme Court on December 3, 1981. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

STATUTES AND REGULATIONS INVOLVED

Section 223 of the Interstate Commerce Act, 49 U.S.C. § 323 (1976), subsequently recodified at 49 U.S.C. § 10743 (Supp. III 1979), is set forth in the Appendix at A-34 to A-36. Section 1322.1 of the regulations promulgated under this provision, 49 C.F.R. § 1322.1 (1980), is set forth in the Appendix at A-36 to A-37.

STATEMENT OF THE CASE

Respondent Alaska Marine Trucking, a Division of Lynden Transport, Inc. ("AMT") brought suit in the Superior Court for King County, Washington against petitioner Carnation Company ("Carnation") to recover the freight charges on a series of shipments of dairy products shipped by motor carrier (with an intervening handling by a water carrier in the middle of the transport) from Seattle, Washington to Anchorage and Fairbanks, Alaska. The case was tried to the court; its Findings of Fact and Conclusions of Law are in the Appendix at A-23 to A-30.

For about 25 years Carnation had been selling its products to a dairy in Alaska known as Meadowmoor Alaska Dairy, Inc. ("Meadowmoor"). These products were shipped to Meadowmoor from Carnation's Seattle plant via various freight carriers of Meadowmoor's choosing. Meadowmoor made all arrangements with those carriers; Carnation merely followed Meadowmoor's directions. As between Carnation, Meadowmoor and the carriers, it was understood Meadowmoor was to pay the freight charges.

In 1977 Meadowmoor's ownership changed hands. Under the prior ownership, Meadowmoor had incurred large debts to Carnation for which Carnation had taken security. Because of those difficulties, Carnation stipulated that the new owners pay cash in advance for Carnation products.

At the time of the change of ownership, it was well-known that Meadowmoor was in financial difficulty. For example, on August 18, 1977, Sea-Land Service, Inc., a shipper previously used by Meadowmoor, commenced an action in Alaska state court against Meadowmoor to collect $194,190.52 in freight charges. In addition, Transport Clearings, which handled all freight collections for its members, including AMT, refused to accept for discount and collection any charges against Meadowmoor.

About this time, AMT, which had excess capacity due to the winding down of the business generated by construction of the Alaskan pipeline, was looking for business. To that end, the Fairbanks, Alaska terminal manager for Lynden Transport and its division AMT, approached one of the owners of Meadowmoor and persuaded him to switch to AMT as Meadowmoor's freight carrier. These arrangements were done without any discussion with Carnation. Carnation was told to ship via AMT as a fait accompli.

In December 1977, Carnation began to ship its products to Meadowmoor by way of AMT. Uniform straight bills of lading as prescribed by the Interstate Commerce Commission ("ICC") were used. The words "freight collect" were written across the front of the bills.

There was a provision on each bill of lading which read as follows:

> Subject to Section 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
> The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Carnation had not signed this provision on any of the relevant bills of lading; its shipping personnel were not schooled in its significance since Carnation used its own transportation equipment except for shipments to Alaska.

After Carnation began shipping via AMT, it never received any of the freight bills. Instead, they were all sent to Meadowmoor, and, in fact, unbeknownst to Carnation, AMT and Meadowmoor had their own secret credit arrangement. As of the end of December 1977, Meadowmoor owed $24,239.71 to AMT. By the end of January 1978 that amount had grown to $89,135.77. As of the end of February, Meadowmoor's delinquency was $139,475.51, and it had ballooned to $158,054.03 by the end of March 1978.

AMT made no real attempt to collect these charges until it was too late. Rather, on March 3, 1978, the vice president and general manager of Lynden Transport wrote to Meadowmoor, calling its attention to the fact that its account exceeded $145,000.00, and stating:

> We agreed to handle your billing on a direct basis, rather than go through Transport Clearings, who will not allow us to see Meadowmoor bills. We heard rumors from our competitors that we could not do business with you. We still disagree with those statements.
>
> The Interstate Commerce Commission says all bills must be collected in seven (7) days. We, when extending credit beyond these regulations, are placing ourselves in a less than favorable position with this regulatory body.

On March 31, he again wrote to Meadowmoor, setting forth a payment schedule and saying:

> Our agreement was that we consider 30 days current. We are bound by the I.C.C. not to extend credit actually beyond 7 days from receipt of invoice. This is considered rebate.

That letter went on to say that AMT appreciated Meadowmoor's business and would continue to try to work with Meadowmoor.

In the first part of April, 1978 AMT decided it could not extend any more credit to Meadowmoor and it put Meadowmoor on a cash basis. Meadowmoor immediately elected to ship by another carrier.

It was not until April 8, 1978 that AMT advised Carnation of Meadowmoor's delinquency. This was the first time that Carnation learned that Meadowmoor had been receiving credit from AMT. Immediately upon learning of the problem, Carnation's attention was called to Section 7 of the bills of lading, and it began signing that section.

AMT, after being unable to collect the freight charges from Meadowmoor, demanded payment of Carnation. Meadowmoor has filed for bankruptcy in the Federal District Court for Alaska and has no money to pay its general creditors.

The amount of unpaid freight charges under the freight bills at issue is $91,100.82, together with the appropriate interest thereon.

The Superior Court for King County, Washington, concluded that federal law governed Carnation's liability for the freight charges, that under ordinary equitable principles AMT would be estopped from collecting the freight charges from Carnation because it had violated ICC credit regulations and the Interstate Commerce Act, 49 U.S.C. § 323, but that equitable principles were not applicable in an action to recover freight charges from Carnation.

On appeal to the Washington State Court of Appeals, Division I, the court, applying federal law, held that although equitable principles were applicable in actions for freight charges, Carnation had not proven the element of rightful reliance in order to establish estoppel. In particular, the Court held that Carnation could not, as a matter of law, rely on AMT's credit practices:

> Moreover, the Interstate Commerce Commission credit rule requiring payment of freight charges within 7 days was designed to prevent carriers from discriminating against customers. (citations omitted) Violation of the rule would not affect the issue of liability. (citations omitted)

30 Wn. App. at 150, 133 P.2d 105, Appendix at A-16 to A-17.

Carnation moved for reconsideration, a step mandated by the Washington Rules of Appellate Procedure, RAP 12.4(a) prior to seeking review in the Washington State Supreme Court. Upon denial of that motion, Carnation petitioned for review by the Washington State Supreme Court, which petition was denied. The opinion of the Washington State Court of Appeals thus became a final judgment "rendered by the highest court of a state in which a decision could be had." 28 U.S.C. § 1257.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Presents an Important Question of Federal Law Indentical to the Question Which This Court Has Agreed to Review in *Southern Pacific Transportation Company v. Commercial Metals Company*, No. 79-1843.

On November 16, 1981, this Court granted a writ of certiorari in 79-1843, *Southern Pacific Transportation Co. v. Commercial Metals Co.* That case had previously been decided by the United States Court of Appeals for the Fifth Circuit, 641 F.2d 235 (1981).

The question presented for review in that case is identical to the issue in the present case, *i.e.*:

> Whether a carrier's violation of credit regulations issued under the Interstate Commerce Act should estop it from collecting the lawful tariff charge from the consignor of an interstate freight shipment, where the consignor is primarily liable under the terms of the bill of lading.

The only difference between the present case and *Commercial Metals* is that the present case involves a motor carrier while *Commercial Metals* involves a rail carrier. However, the statutory provisions and ICC regulations governing both types of carriers are substantially similar, if not identical.[1] Otherwise, the facts of the two cases with respect to all important details are identical. Both involve actions by carriers against consignors; both involve straight uniform bills of lading; in neither did the consignor sign § 7; and in both the carrier violated ICC credit regulations.

It would be anomalous for the Court to review *Commercial Metals* and not to review the instant case, in light of their similarity. This anomaly would be particularly striking if the Court affirms the Fifth Circuit decision in *Commercial Metals* because it would mean that a decision of the highest court in which review could be obtained in the state of Washington was in direct conflict, on an issue of federal law, with a decision of this Court. Such a result could be avoided by the expedient of granting Carnation's Petition for Writ of Certiorari, and either consolidating review with *Commercial Metals* or summarily affirming or reversing this case based on the result in *Commercial Metals*.

Review of this case simultaneously with review of *Commercial Metals* would offer two advantages. First, it would enable this Court to deal with the rule with respect to motor carriers in addition to the rule with respect to rail carriers. Second, it would provide the Court with enough of a difference in the conduct of the carriers in the two cases to consider more adequately the potential ramifications of any rule which this Court ultimately sets forth. For example, the instant case involves a continuous course of conduct, rather than two isolated shipments, as in *Commercial Metals*. The instant case also involves a secret agreement between the carrier and the consignee for the extension of credit, a involves a situation where the precarious financial condition of the consignee was well-known to the carrier, yet the carrier extended credit anyway. In declaring a rule to be followed in future cases, the Court may well be interested in whether

[1] *Compare* 49 U.S.C. § 323 (1976) (motor carrier) *with* 49 U.S.C. § 3(2) (1976) (rail carrier). These provisions have since been recodified in one provision, 49 U.S.C. § 10743 (Supp. III 1979). Similarly, the credit regulations follow the same pattern, although they differ in certain details. *Compare* 49 C.F.R. § 1322.1(a) (1980) (motor carrier) *with* 49 C.F.R. § 1320.1 (1980) (rail carrier).

that rule should apply under all circumstances or whether facts, such as set out above, may make a difference.

2. The Decision Below Conflicts With the Decisions of the Highest Courts of Several Jurisdictions Which Have Held That Credit Violations By Carriers May Be Used to Establish an Estoppel Defense.

The conflict among various jurisdictions on this issue is most clearly illustrated by the Fifth Circuit decision discussed above, *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 641 F.2d 235 (5th Cir. 1981), *cert. granted*, No. 79-1843 (November 16,1981). That case is in direct conflict with the instant one. In *Commercial Metals* the Fifth Circuit squarely held that violations of ICC credit regulations could be used as a defense in an action for freight charges against a consignor. That holding is in direct opposition to the Washington State Court of Appeals' holding in this case that "Violation of the [credit] rule would not affect the issue of liability." 30 Wn. App. at 150, 633 P.2d 105 (Appendix at A-16 to A-17.)

The holding in the instant case also conflicts, on an issue of federal law, with two other decisions of federal courts, *Consolidated Freightways Corp. of Delaware v. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971); *Mason and Dixon Lines, Inc. v. Crossville Rubber Products, Inc.*, 414 F. Supp. 166 (M.D. Tenn. 1976); and with various decisions of state courts, *i.e., Brown Transportation Corp. v. Atcon, Inc.*, 144 Ga. App. 301, 241 S.E.2d 15 (1977), *cert. denied*, 439 U.S. 1014 (1978); *Penbrook Hauling Co. v. Sovereign Constr. Co.*, 128 N.J. Super. 179, 319 A.2d 277 (1974), *aff'd*, 136 N.J. Super. 395, 346 A.2d 433 (1975); *Airborne Freight Corp. v. Irving Trust Co.*, 26 App. Div. 507, 275 N.Y.S.2d 863 (1966); *Tom Hicks Transfer Co. v. Ford, Bacon & Davis Texas, Inc.*, 482 S.W.2d 364 (Tex. Civ. App. 1972).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Washington State Court of Appeals, Division I, either in conjunction with *Southern Pacific Transportation Co. v. Commercial Metals Co.*, No. 79-1843, or summarily, based on the ruling in *Commercial Metals*.

Respectfully submitted,

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By: KEITH R. BALDWIN

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Attorneys for Petitioner
Carnation Company

Dated: January 25, 1982

Appendix

ALASKA MARINE TRUCKING v. CARNATION CO.

30 Wn. App. 144

[No. 9226-0-I. Division One.
August 10, 1981]

ALASKA MARINE TRUCKING, Respondent, v.
CARNATION COMPANY, Appellant.

[1] Contracts -- Carriers -- Bills of Lading -- Nature -- Construction. A bill of lading is the contract between a consignor and a carrier. When the freight is to travel in interstate commerce, the bill of lading is interpreted in accordance with federal law.

[2] Carriers -- Liability for Charges -- Bills of Lading -- Nonrecourse Clause -- Effect. The failure of a consignor to sign the nonrecourse provision of a bill of lading renders it liable to the carrier for freight charges unless the defense of estoppel or release is applicable.

[3] Carriers -- Liability for Charges -- Estoppel -- Application. Estoppel is available as a defense in an action to collect interstate freight charges unless its application would contradict the federal statutory policy of preventing discriminatory treatment of shippers.

[4] Estoppel -- Elements -- Burden of Proof. The party asserting an estoppel defense has the burden of proving every element of estoppel.

[5] Carriers -- Liability for Charges -- Nonpayment -- Duty to Notify Consignor. A carrier of freight shipped in interstate commerce as "freight collect" has no duty to notify the consignor immediately of the consignee's failure to pay the freight charges within the 7-day payment period established by the Interstate Commerce Commission.

[6] Guaranty and Suretyship -- Time for Payment -- Indefinite Extension -- Effect. A principal's extension of the time for payment on the underlying obligation by an indefinite period does not discharge the surety.

NATURE OF ACTION: An interstate carrier sought to recover freight charges from the consignor after the consignee became insolvent. The bills of lading designated the shipments as "freight collect," and the provisions disallowing recourse against the consignor had not been completed.

SUPERIOR COURT: The Superior Court for King County, No. 848626, Arthur E. Piehler, J., entered a judgment in favor of the carrier on December 5, 1979.

COURT OF APPEALS: Holding that an estoppel defense was applicable but that the consignor had not proved that it had relied to its detriment on the acts or

representations of the carrier, the court affirms the judgment.

Reaugh, Hart, Allison, Prescott & Davis, Keith R. Baldwin, Helsell, Fetterman, Martin, Todd & Hokanson, Richard, S. White, and Linda Cochran, for appellant.

Aiken, St. Louis & Siljeg and Douglas W. McQuaid, for respondent.

SWANSON, J.--The Carnation Company appeals a judgment in favor of Alaska Marine Trucking (AMT) for $91,100.82 in freight charges. Alaska Marine Trucking cross-appeals the trial court's conclusion of law that it would be estopped from collecting at least part of the freight charges under ordinary rules of equity.

For about 25 years, Carnation sold dairy products to Meadowmoor Alaska Dairy (Meadowmoor). Carnation shipped these products to Meadowmoor in Alaska via interstate carriers designated by Meadowmoor. By 1977, Meadowmoor had

become a bad credit risk. It owed Carnation a considerable amount of money so that Carnation arranged for payment of its goods prior to delivery to Meadowmoor.

About November 1977, Meadowmoor's new owner, Gil D'Amato, designated AMT as the carrier for consolidated shipments from Seattle/Tacoma to Alaska. AMT did not make a credit check on Meadowmoor before it started shipping for Meadowmoor. Because Meadowmoor was on the Transport Clearing[1] nonpurchase list, AMT billed Meadowmoor directly within 7 days of delivery in accordance with ICC regulations, 49 CFR § 1322.1 and § 1322.3.

In December 1977, Carnation began shipping to Meadowmoor via AMT. For each

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[1]Transport Clearing (now called Tradex) bills customers of member freight carriers for transportation services. As a member of Transport Clearing, AMT agreed to sell its freight bills to Transport Clearing except for AMT customers on the nonpurchase list.

shipment, a Carnation employee completed a standard bill of lading which became the contract between Carnation and AMT. Carnation designated the shipments as freight collect,[2] but it did not fill in the section 7 nonrecourse provision.[3]

Meadowmoor immediately fell behind in paying AMT for freight charges. Despite only a minor dispute over freight charges which AMT corrected by the middle of

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[2]Freight collect means the consignee undertakes to pay freight charges which are due and payable within 7 days of receiving the invoice. The shipper still remains responsible for the freight charges. Carnation believed freight collect placed all responsibility for freight charges on the consignee.

[3]By signing the nonrecourse provision, the shipper places all responsibility for freight charges on the consignee. The bills of lading provided: "Subject to Section 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges."

February, by the end of the month Meadowmoor owed $139,475.51. The unpaid charges reached over $158,000 by the end of March. On March 3, AMT wrote Meadowmoor requesting an immediate payment of at least $25,000 on the delinquent account. Meadowmoor did pay about $61,000 against the account during March. On March 31, 1978, AMT by letter proposed a payment schedule to bring Meadowmoor current by May 1, 1978. However, AMT placed Meadowmoor on driver collect[4] the next day. Shortly thereafter, Meadowmoor switched to another carrier. On April 8, 1978, AMT first advised Carnation of Meadowmoor's delinquent account, for

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[4]Under driver collect, the consignee must pay freight charges to the delivering carrier before that carrier will release a shipment.

which Carnation would still be liable.[5] On April 12, Carnation began signing the section 7 nonrecourse provision on all bills of lading for shipments to Meadowmoor.

Carnation continued to supply dairy products to Meadowmoor until the middle of May 1978. By a formal certified letter dated July 11, 1978, AMT demanded payment of the outstanding freight charges on the Meadowmoor account from Carnation. AMT then sued Carnation on July 25, 1978. Meadowmoor filed for bankruptcy on September 5, 1978. Meadowmoor is insolvent and has no assets available to meet the freight charges owed.

The trial court in determining liability for the freight charges awarded AMT

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[5] Carnation claimed it would have taken steps to protect itself from liability if it had been notified earlier. However, signing the nonrecourse provision was apparently its only change in dealing with AMT after April 12.

a judgment for $91,100.82 against Carnation. It concluded as a matter of law that Carnation would have an equitable estoppel defense for at least part of these charges under ordinary equitable principles.[6] However, it stated that the great weight of authority prohibited the application of equitable principles to this case.

Carnation contends that estoppel does apply to this case to relieve it from liability. It also argues that surety law absolves it from liability because it claims AMT made a binding agreement with Meadowmoor to extend the time for payment of the freight charges without informing Carnation as surety, causing the surety's discharge.

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[6]However, the trial court made no fact findings on the elements of estoppel. Because the facts of the case are essentially undisputed, we must treat the issue of estoppel as a question of law.

[1,2] The standard bills of lading completed by Carnation and accepted by AMT constitute the contracts between these two parties. Transport Clearing Northwest v. Bardahl Mfg. Co., 22 Wn. App. 568, 589 P.2d 1242 (1978). Federal law governs the interpretation of bills of lading used for interstate shipments. Illinois Steel Co. v. Baltimore & O. R.R., 320 U.S. 508, 88 L. Ed. 259, 64 S. Ct. 322 (1944). A freight consignor who does not sign the nonrecourse provision of the standard bill of lading remains liable to the carrier for all lawful charges. Illinois Steel Co. v. Baltimore & O. R.R., supra. Therefore, in the absence of estoppel or release, Carnation would be liable for the freight charges.

There are two major lines of cases which discuss the application of equitable estoppel defenses to freight charges--undercharge cases and double payment

cases. In the undercharge cases where the carrier has charged less than the published, legally payable tariff rate, estoppel is not available as a defense when the carrier demands the full tarriff. See, e.g., Louisvill & N. R.R. v. Central Iron & Coal Co., 265 U.S. 59, 65, 68 L. Ed. 900, 44 S. Ct. 441 (1924); Pittsburgh, C., C. & St. L. R.R. v. Fink, 250 U.S. 577, 582-83, 63 L. Ed. 1151, 40 S. Ct. 27 (1919). These decisions disallow estoppel to provide uniformity in charges for freight services under the Interstate Commerce Act and, thereby, to prevent rate discrimination. See, e.g., Midstate Horticultural Co. v. Pennsylvania R.R., 320 U.S. 356, 361, 88 L. Ed. 96, 64 S. Ct. 128 (1943); Illinois Cent. Gulf R.R. v. Golden Triangle Wholesale Gas Co., 586 F.2d 588, 592 (5th Cir. 1978). In the double payment cases, where goods are shipped under prepaid bills of lading so that the consignee, relying on

this representation of prepaid freight charges, pays the consignor for the goods including freight charges, the defense of estoppel is available to the consignee against the carrier to prevent double payment liability for the consignee. See, e.g., Southern Pac. Transp. Co. v. Campbell Soup Co., 455 F.2d 1219 (8th Cir. 1972); Consolidated Freightways Corp. v. Admiral Corp., 442 F.2d 56 (7th Cir. 1971); Missouri Pac. R.R. v. National Milling Co., 409 F.2d 882 (3d Cir. 1969).

[3] The present case involves neither an undercharge for services performed nor a potential double payment liability for the consignee. Instead the case concerns the liability of a consignor (Carnation) for freight charges on freight collect shipments because the bankrupt consignee (Meadowmoor) is insolvent and the carrier negligently failed to collect or to inform the shipper of the overdue account until it

became seriously delinquent. In determining if the defense of estoppel is available in a freight rate case, this court in Lyon Van Lines, Inc. v. Cole, 9 Wn. App. 382, 387, 512 P.2d 1108 (1973), quoting Consolidated Freightways Corp. v. Admiral Corp., supra at page 62, stated:

> The crucial question is not whether estoppel is urged as a bar to collection of the tariff rate as such, but whether the use of estoppel to prevent recovery on the facts of the particular case contradicts the statutory policy of Section 223 [49 U.S.C. § 323, now 49 U.S.C. §§ 10743, 10744] to curb discriminatory treatment of shippers.

Accord, Union Pac. R.R. v. Stadelman Fruit, Inc., 13 Wn. App. 824, 827, 537 P.2d 1076 (1975); see Southern Pac. Transp. Co. v. Campbell Soup Co., supra. There is no question of possible preferential treatment for one consignor over another in the instant case. Thus, under the facts of this case, the use of an estoppel defense by Carnation to prevent recovery by AMT as

carrier does not contravene the antidiscriminatory purposes of the Interstate Commerce Act. Therefore, the trial court should have allowed the application of Carnation's estoppel defense.

[4] Equitable estoppel arises when one wrongfully or negligently, by acts or representations, causes another who has a right to rely on such acts or representations to change position to its detriment.[7] State v. Charlton, 71 Wn 2d 748, 751, 430 P.2d 977 (1967). The burden of proving estoppel and the material facts to support estoppel is on the party claiming estoppel.

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[7] The elements of estoppel are also commonly described as (1) an admission, statement, or act inconsistent with a claim afterwards asserted, (2) an action by the other party on the faith of such admission, statement, or act, and (3) an injury to the other party if the claimant is allowed to contradict or repudiate the earlier admission, statement, or act. Liebergesell v. Evans, 93 Wn.2d 881, 889, 613 P.2d 1170 (1980); Arnold v. Melani, 75 Wn.2d 143, 147, 437 P.2d 908 (1968).

State v. Charlton, at 751; Stouffer-Bowman, Inc. v. Webber, 18 Wn.2d 416, 139 P.2d 717 (1943).

Carnation asserts it has shown the necessary elements of estoppel because it claims (1) AMT extended credit to Meadowmoor in violation of Interstate Commerce Commission regulations without informing Carnation, (2) Carnation rightfully relied on its belief that AMT would collect the freight charges within 7 days of invoicing, and (3) Carnation was injured by relying on this belief in that it continued to ship products to Meadowmoor, allowing even more freight charges to accrue.

[5] However, Carnation has failed to prove estoppel because it has not shown that it rightfully relied on AMT's credit practices. As Carnation's general sales manager, Wayne Boynton, admitted, he thought by shipping freight collect that Carnation had placed all responsibility for

freight charges on Meadowmoor. Carnation's shipping clerk in charge of the shipments to Meadowmoor also admitted she was unaware of the section 7 nonrecourse provision on the bills of lading until about April 12, 1977. Carnation then relied on its own choice of shipping "freight collect" to limit its liability, not on AMT's credit practices. Moreoever, the Interstate Commerce Commission credit rule requiring payment of freight charges within 7 days was designed to prevent carriers from discriminating against customers. United States v. Pennsylvania R.R., 308 F. Supp. 293, 297 (E.D. Pa. 1969); United States v. General Expressways, Inc., 270 F. Supp. 115, 117 (D. Colo. 1967); Arizona Feeds v. Southern Pac. Transp. Co., 21 Ariz. App. 346, 519 P.2d 199, 207 (1974); Consolidated Freightways Corp. v. Eddy, 266 Or. 385, 513 P.2d 1161, 1166 (1973). Violation of the

rule would not affect the issue of liability. AAA Trucking Corp. v. Spherex, Inc., 110 N.H. 472, 272 A.2d 594, 595 (1970); East Tex. Motor Freight Lines v. Franklin County Distilling Co., 184 S.W.2d 505, 507 (Tex. Civ. App. 1944). The carrier, AMT, did not have a duty to notify Carnation immediately of the failure of Meadowmoor to pay the freight charges when due, and want of such notice is no defense.[8] Long Island R.R. v. Midland Valley Lumber Co., 237 Mo. App. 147, 164 S.W.2d 930, 933 (1942), and cases cited therein; but see Brown Transp. Corp. v. Atcon, Inc., 144 Ga. App. 301, 241 S.E.2d 15, 16 (1977), cert. denied, 439 U.S. 1014, 58 L. Ed. 2d 687, 99 S. Ct. 626 (1978) (requiring carrier

---

[8] An estoppel by silence cannot exist unless the party to be estopped has some duty to disclose that which is claimed as the basis for the estoppel. Pacific Nat'l Bank v. Richmond, 12 Wn. App. 592, 596, 530 P.2d 718 (1975).

to bill consignor within 7 days of delivery on freight collect shipment to maintain consignor's potential liability for freight charges). Consequently, Carnation did not show that it rightfully relied to its detriment on acts or representations by AMT. Thus, Carnation failed to prove the defense of estoppel. Cf. Arnold v. Melani, 75 Wn.2d 143, 147, 437 P.2d 908 (1968) (elements of estoppel not established by facts).

[6] We also disagree with Carnation's argument that it was relieved of liability as a surety because it claimed AMT made a binding agreement with Meadowmoor to extend the time of payment without informing Carnation. Assuming arguendo that Carnation was a surety, AMT made no binding agreement with Meadowmoor to extend the time of payment. Meadowmoor remained free to pay at any time. Any time extension was at best for an indefinite time because of

Meadowmoor's financial difficulties and AMT's lax payment collection practices. Such an indefinite time extension for payment would not discharge a surety. See Van de Ven v. Overlook Mining & Dev. Co., 146 Wash. 332, 335, 262 P. 981 (1928). Therefore, Carnation's liability for the freight charges was not discharged.

The judgment is affirmed.

RINGOLD, A.C.J., and DURHAM, J., concur.

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

ALASKA MARINE TRUCKING, a division of LYNDEN TRANSPORT, INC., Respondent, v. CARNATION COMPANY, Appellant.	NO. 9226-0-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Carnation Company, having filed its motion for reconsideration herein, and the court having determined that it should be denied, Now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same hereby is, denied.

DATED this 23rd day of September, 1981.

/s/
(Acting) Chief Judge

FILED
Court of Appeals, Division I
'81 SEP 23 AM 8:43

THE SUPREME COURT

State of Washington

Olympia
98504

December 3, 1981

Hart, Allison, Davis
& Baldwin
Mr. Keith R. Baldwin
1100 IBM Bldg.
Seattle, Washington 98101

Helsell, Fetterman, Martin,
Todd & Hokanson
Mr. Richard S. White
Ms. Linda J. Cochran
P.O. Box 21846
Seattle, Washington 98111

Aiken, St. Louis & Siljeg
Mr. Douglas W. McQuaid
1215 Norton Bldg.
Seattle, Washington 98104

Counsel:

Re: Supreme Court No. 48202-1-Alaska Marine Trucking v. Carnation Company
Court of Appeals No. 9226-0-I

Following consideration of the above entitled Petition for Review on December 3, 1981, the following notation order was entered on page 140, Volume 2, of the Petition for Review Docket:

"DENIED"

/s/ William H. Williams
Acting Chief Justice

Very truly yours,

/s/ John J. Champagne
JOHN J. CHAMPAGNE
Clerk

JJC:lb
cc: Court of Appeals, Division I

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

ALASKA MARINE TRUCKING, a Division of LYNDEN TRANSPORT, INC., a Washington corporation,	)	NO. 848626
Plaintiff,	)	FINDINGS OF FACT AND
vs.	)	CONCLUSIONS OF LAW
CARNATION COMPANY, a foreign corporation,	)	
Defendant.	)	

THIS MATTER having come on regularly for trial on October 23, 24 and 25, 1979, before the honorable Arthur E. Piehler, sitting without a jury; the plaintiff appearing through its counsel, Douglas W. McQuaid of Aiken, St. Louis & Siljeg, and the defendant appearing through its counsel, Richard S. White, of Helsell, Fetterman, Martin, Todd & Hokanson, their respective attorneys of record; witnesses having been sworn and testified, exhibits having been introduced into evidence, the court having considered briefs and heard argument

of counsel, and the court being fully advised in the premises, the court now makes and enters the following:

FINDINGS OF FACT

1. The plaintiff, Lynden Transport, Inc., is, and at all times material hereto was, a Washington corporation, Alaska Marine Trucking being a division thereof, and maintains its principal place of business in Seattle, Washington.

2. The plaintiff is, and at all times material hereto was, a common motor freight carrier operating under authority of the Interstate Commerce Commission.

3. The defendant, Carnation Company, is, and at all times material hereto was, a Delaware corporation, operating and maintaining a place of business in Seattle, Washington.

4. Between December, 1977, and April, 1978, the plaintiff was named by Meadowmoor Alaska Dairy, Inc. to carry goods from the

defendant's plant in Seattle, Washington, to Meadowmoor in Anchorage and Fairbanks, Alaska.

5. At the time the carriage began, both parties knew, or should have known, that Meadowmoor was a bad credit risk.

6. A series of contracts in the form of bills of lading prepared by the defendant and accepted by the plaintiff were entered into by the parties. (Exhibit 3)

7. Said contracts provided for an election under so-called "Section 7", in which the defendant had the right to require the plaintiff to collect freight charges from Meadowmoor at the time of delivery, or eliminate the liability of the defendant for those charges. The defendant did not elect to exercise that option until April 12, 1978. Whether the election was an error, or whether it was intentional is immaterial.

8. The carriage of the freight involved an intervening handling by a water carrier in the middle of the transport; the early stages being by truck in Washington, the later stages by truck in Alaska, and the intervening stage by water between Washington and Alaska. The plaintiff was not acting as a freight forwarder.

9. The plaintiff transported the merchandise in question under the said bills of lading, but did not collect the freight charges within the seven days as required by the Interstate Commerce Commission.

10. The plaintiff allowed Meadowmoor to become seriously delinquent on its account and did not advise the defendant of said delinquency until April 8, 1978. Thereafter, the defendant exercised its Section 7 election to require the collection of the freight charges at delivery.

11. Meadowmoor Alaska Dairy, Inc., is insolvent and has filed for bankruptcy in the Federal District Court for Alaska. The unpaid freight charges would become a general creditors claim against Meadowmoor and Meadowmoor has no money to pay general creditors.

12. There remains unpaid freight charges under the subject freight bills (Exhibit 1) and the bills of lading in the amount of $91,392.66, less the amount of $291.84 charged to defendant for consolidation charges which are the exclusive responsibility of consignee under plaintiff's tariff.

From the foregoing Findings of Fact, the court now makes and enters the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and subject matter in this action.

2. The defendant's liability for interstate freight charges must be determined in accordance with federal law. Part II of the Interstate Commerce Act, 49 USC §317, requires that plaintiff charge and collect the full amount of the freight charges determined in accordance with plaintiff's tariff on file with the Interstate Commerce Commission from the parties liable for such charges.

3. The bills of lading (Exhibit 3) together with the plaintiff's filed tariffs, constitute the contracts of carriage. The parties are bound by the terms of the said Uniform Bills of Lading. Section 7 of the terms and conditions of each of the bills of lading provides that the defendant, as consignor, is liable for all freight charges unless it signs the Section 7 non-recourse stipulation on the face of each bill of lading.

4. Equitable principles are not applicable to estop or preclude the plaintiff from recovering the full amount of the freight charges from the defendant. Under ordinary rules of equity the plaintiff would be estopped by its conduct in allowing the charges to build to such a great amount and it was at least negligent in its handling of this account. The plaintiff not only violated the seven-day collection rule but also extended credit in violation of the ICC regulations, 49 C.F.R. Part 1322, and the statute, 49 U.S.C. §323. However, the court is bound by federal law and federal statute and the ICC regulations of course are part of those. Under ordinary principles of equity there would certainly be a defense to the defendant to at lease [sic] a part of these charges. However, the great weight of authority prohibits this court from applying equitable principles.

5. Plaintiff should be awarded judgment against the defendant, Carnation Company, in the sum of $91,100.82, with interest thereon at the legal rate from July 21, 1978, with interest from the date of judgment until paid at the rate of 8% per annum, plus plaintiff's costs and disbursements incurred herein.

DONE IN OPEN COURT this 5th day of December, 1979.

/s/ Arthur E. Piehler
Arthur E. Piehler, Judge

Presented by:

AIKEN, ST. LOUIS & SILJEG

By /s/ Douglas W. McQuaid
Douglas W. McQuaid
Attorneys for Plaintiff

Approved as to form only,
and Notice of Presentation
Waived:

HELSELL, FETTERMAN, MARTIN, TODD & HOKANSON

By /s/ Richard S. White
Richard S. White
Attorneys for Defendant

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

ALASKA MARINE TRUCKING, a Division of LYNDEN TRANSPORT, INC., a Washington corporation,	)	NO. 848626
Plaintiff,	)	JUDGMENT
vs.	)	
CARNATION COMPANY, a foreign corporation,	)	
Defendant.	)	

THIS MATTER having come on regularly for trial on October 23, 24 and 25, 1979, before the Honorable Arthur E. Piehler, sitting without a jury, the plaintiff appearing through its counsel, Douglas W. McQuaid of Aiken, St. Louis & Siljeg, and the defendant appearing through its counsel, Richard S. White, of Helsell, Fetterman, Martin, Todd & Hokanson, their respective attorneys of record, witnesses having been sworn and testified, exhibits having been introduced into evidence, the court having considered briefs and heard argument

of counsel, and the court having heretofore entered its Findings of Fact and Conclusions of Law, and being otherwise fully advised in the premises; the court now enters its Judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff, Lynden Transport, Inc., be and it hereby is, awarded judgment against defendant, Carnation Company, a Delaware corporation in the sum of $91,100.82, with interest thereon at the rate of 6% per annum from July 21, 1978, and interest at the rate of 8% per annum from the date of this judgment until paid, plus plaintiff's costs and disbursements incurred herein.

DONE IN OPEN COURT this 5th day of December, 1979.

/s/ Arthur E. Piehler
Arthur E. Piehler, Judge

Presented by:

AIKEN, ST. LOUIS & SILJEG

By /s/ Douglas W. McQuaid
Douglas W. McQuaid
Attorneys for Plaintiff

Approved as to form only,
and Notice of Presentation
Waived;

HELSELL, FETTERMAN, MARTIN, TODD &
HOKANSON

By /s/ Richard S. White
Richard S. White
Attorneys for Defendant

Section 323 of the Interstate Commerce Act, 49 U.S.C. § 323 (1976), prior to recodification in 1978, provided as follows:

> § 323. Collection of rates and charges; extension of credit; liability of agent of beneficial owner
>
> No common carrier by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it in interstate or foreign commerce until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for weekly or monthly settlement, and to prevent unjust discrimination or undue preference or prejudice: Provided, That the provisions of this section shall not be construed to prohibit any such carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory, or political subdivision thereof, or for the District of Columbia. Where any common carrier by motor vehicle is instructed by a shipper or consignor to deliver property transported by such carrier to a consignee other than the shipper or consignor, such consignee shall not

be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and had no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. If the consignee has given to the carrier erroneous information as to who is the beneficial owner, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this section. On shipments reconsigned or diverted by an agent who has furnished the carrier with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or

abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith.

Section 1322.1(a) of the regulations of the Interstate Commerce Commission, 49 C.F.R. § 1322.1(a) (1980) provides as follows:

1322.1. Carrier may extend credit to shipper.

(a) Upon taking precautions deemed by them to be sufficient to assure payment of the tariff charges within the credit period herein specified, common carriers by motor may relinquish possession of freight in advance of payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay them, such persons herein being called shippers, for a period of 7 days excluding Saturdays, Sundays, and legal holidays. When the freight bill covering a shipment is presented to the shipper on or before the date of delivery, the credit period shall run from the first 12 o'clock midnight following delivery of the freight. When the freight bill is not presented to the shipper on or before the date of delivery, the credit period shall run from the first 12 o'clock midnight following

the presentation of the freight bill. In regard to traffic of nonprofit shippers' associations and shippers' agents, within the meaning of section 402(c) of part IV of the Interstate Commerce Act, the carriers shall require such organizations to furnish the names of the beneficial owners of the property in the bills of lading incorporate by reference a document containing the names of the beneficial owners.

Opposition

Office - Supreme Court, U.S.
FILED
MAR 1 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1488

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

ALASKA MARINE TRUCKING, a division of LYNDEN TRANSPORT, INC.,
Respondent,

v.

CARNATION COMPANY,
Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION I

AIKEN, ST. LOUIS & SILJEG
By: GEORGE S. MARTIN
DOUGLAS W. McQUAID
Attorneys for Respondent

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ABCD AT CRAFTSMAN PRESS, SEATTLE

QUESTION PRESENTED

Whether a carrier's violation of credit regulations under the Interstate Commerce Act may estop it from collecting freight charges from a consignor where the consignor has failed to prove it justifiably relied on the carrier's credit practices.

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

The subsidiaries and affiliates of the respondent are:

General Freight Division

Milky Way Division

Dairy Express, Inc.

Lynden Air Freight Forwarder, Inc.

Canadian Lynden Transport, Inc.

Alaska West Express, Inc.

Southeast Alaska Barge Line Incorporated

Knik Construction Co., Inc.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

ALASKA MARINE TRUCKING, a division of LYNDEN TRANSPORT, INC.,
Respondent,

v.

CARNATION COMPANY,
Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION I

STATEMENT OF THE CASE

There are a number of inaccuracies and ommissions in the statement of the case contained in the Petition. However, it is not deemed necessary to correct these errors in order to present respondent's argument. The facts of the case are essentially undisputed. The unchallenged

Findings of Fact by the trial court pertinent to the Petition are as follows:

> 5. At the time the carriage began, both parties knew, or should have known, that Meadowmoor was a bad credit risk.
>
> 6. A series of contracts in the form of bills of lading prepared by the defendant [Carnation] and accepted by the plaintiff [AMT] were entered into by the parties. [Exhibit 3.]
>
> 7. Said contracts provided for an election under so called "Section 7", in which the defendant had the right to require the plaintiff to collect freight charges from Meadowmoor at the time of delivery, or eliminate the liability of the defendant for those charges. The defendant did not elect to exercise that option until April 12, 1978. Whether the election was in error, or whether it was intentional, is immaterial.

Petitioner's Appendix at A-25.

The Superior Court for King County, Washington, concluded that although AMT had violated the credit regulations of the Interstate Commerce Act equitable principles were not applicable to estop or

preclude AMT from recovering the full amount of the freight charges from Carnation. App. at A-29.

On appeal, the Washington State Court of Appeals, Division I, held that equitable estoppel was available to the consignor as a defense to the carrier's action for collection of freight charges:

> Thus, under the facts of this case, the use of an estoppel defense by Carnation to prevent recovery by AMT as carrier does not contravene the anti-discriminatory purposes of the Interstate Commerce Act. Therefore, the trial court should have allowed the application of Carnation's estoppel defense.

20 Wn. App. at 149, 133 P.2d 104, App. at A-13 to A-14.

The Washington State Court of Appeals decided that Carnation failed to prove the allowable equitable defense of estoppel because Carnation did not show that it rightfully relied on AMT's credit practices:

> However, Carnation has failed to prove estoppel because it has not shown that it rightfully relied on AMT's credit practices. As Carnation's general sales manager, Wayne Boynton, admitted, he thought by shipping freight collect that Carnation had placed all responsibility for freight charges on Meadowmoor. Carnation's shipping clerk in charge of the shipments to Meadowmoor also admitted she was unaware of the Section 7 nonrecourse provision on the bills until about April 12, 1977. Carnation then relied on its own choice of shipping "freight collect" to limit its liability, not on AMT's credit practices.
>
> . . . .
>
> Consequently, Carnation did not show that it rightfully relied to its detriment on acts or representations by AMT. Thus, Carnation failed to prove the defense of estoppel. Cf. Arnold v. Melani, 75 Wn.2d 143, 147, 437 P.2d 908 (1968) (elements of estoppel not established by facts).

30 Wn. App. at 150-151, 133 P.2d 105-106, App. at A-15 to A-18.

Accordingly, although the Washington State Court of Appeals did allow the estoppel defense as a matter of law, it ruled that Carnation had not shown by the

evidence that it rightfully relied on AMT's credit practices, or the credit regulations of the Interstate Commerce Commission. Carnation failed to meet its burden of proving the essential factual elements of the defense of equitable estoppel. In its opinion, the Washington State Court of Appeals noted the decisions of other jurisdictions which have held that violation of the credit rules of the Interstate Commerce Commission does not affect the issue of liability for freight charges. 30 Wn. App. 150, 133 P.2d 105, App. at A-16 to A-17. However, its decision did not depend upon application of that principle because the court decided that Carnation had not factually shown that it relied on AMT's credit practices to prove its estoppel defense. Consequently, the issues presented by the Petition in this case are essentially factual issues.

SUMMARY OF ARGUMENT

The decision in Southern Pacific Transportation Co. v. Commerical Metals Co., 641 F.2d 235 (1981), cert. granted, No. 79-1843 (November 16, 1981), could not possibly affect the result in this case. Both cases hold that equitable estoppel is a defense available to a consignor in an action for freight charges. The defense was not proven by the facts in this case. Therefore, regardless of the outcome of the Commercial Metals case, the decision in this case must be affirmed. Consequently, there would be no purpose to be served in joining this case with the review of the Commercial Metals case. In this case the court did not deny the shipper the right to prove an estoppel defense based upon violation of the credit rules.

There is no conflict between the decision in the instant case and the

decisions of other jurisdictions cited by Carnation. All of the cases cited by Carnation allow the equitable defense of estoppel as the court did in this case. The only difference between those cases and the instant case is that estoppel was shown by the facts in those cases but not in this case. The only conflict is on the facts - not the law.

ARGUMENT

1. The Question Presented By the Petition Is Not Identical to the Question to be Reviewed in Southern Pacific Transportation Co. v. Commercial Metals Co., No. 79-1843

Carnation claims the question presented by its Petition is identical to the question presented by Southern Pacific Transportation Co. v. Commercial Metals Co., 641 F.2d 235 (1981), cert. granted, No. 79-1843 (November 16, 1981). The sole question presented by that appeal was

whether a defense is available to a consignor based upon the carrier's violation of the Interstate Commerce Commission credit regulations. In this case, the appellate court held that the defense of equitable estoppel based upon a carrier's violation of the credit regulations is available to the consignor. Therefore, both the Fifth Circuit and the Washington State Court of Appeals have held that the defense of estoppel based on violation of the credit regulations is available to a consignor in an action by a carrier for freight charges. The only difference between the rulings of the two courts is that the Washington court decided the consignor had not factually proved the elements of the defense while the Fifth Circuit apparently decided the consignor did prove the estoppel defense.

Petitioner is obviously confused by the distinction between availability of a

defense and proof of the factual elements of that defense. If this Court affirms the Fifth Circuit decision in Commercial Metals, it would not conflict with the decision of the Washington State Court of Appeals in this case. Both decisions are in complete harmony - the defense of estoppel based upon violation of the credit regulations is available to a consignor. Of course, the consignor must plead and prove its defense to prevail at trial, which it did not do in this case.

If this Court reverses the Fifth Circuit decision in Commercial Metals, the decision in this case would not be affected. If the defense of estoppel is not available to a consignor, the result in this case will remain the same since the defense was not applied because not proved. Thus, the decision in this case could only be affirmed no matter what the outcome of the Commercial Metals case.

To join this case with the Commercial Metals case could accomplish no constructive purpose other than to further delay the final result of the case. If the Washington State Court of Appeals errored in allowing the estoppel defense, it was obviously a harmless error. If the court should not have allowed the estoppel defense, then the result remains the same - the carrier prevails.

2. The Decision Below Does Not Conflict With Decisions of Other Jurisdictions

As pointed out above, the Washington State Court of Appeals allowed the estoppel defense pleaded by Carnation. Although Carnation was not able to prove the defense, the Washington court recognized that under federal law the defense of estoppel could be interposed by a shipper to defeat the carrier's action to recover unpaid freight charges. The decisions of other

jurisdictions cited by petitioner in support of its argument that the instant case conflicts with those decisions are all consistent with the decision in this case. Therefore, no such conflict exists.

The decision in Consolidated Freightways Corp. of Delaware v. Admiral Corp., 442 F.2d 56 (7th Cir. 1971) is consistent with the ruling in the instant case. In Admiral, the court held that estoppel was an available defense which the consignee proved by showing it had relied to its detriment on the bills of lading issued in the carrier, marked "prepaid", by paying the freight charges to the consignor. Thus, recovery of the freight charges by the carrier would result in "double payment" of those charges by the consignee. That decision is entirely harmonious with the holding in this case, which allowed the defense but held the consignor had not

proven the elements of estoppel because there was no showing of any action taken in reliance on any representation of the carrier.

Similarly, Mason and Dixon Lines, Inc. v. Crossville Rubber Products, Inc., 414 F. Supp. 166 (M.D. Tenn. 1976); Penbrook Hauling Co. v. Sovereign Const. Co., 128 N.J. Super. 179, 319 A.2d 277 (1974), aff'd, 136 N.J. Super. 395, 346 A.2d 433 (1975); Airborne Freight Corp. v. Irving Trust Co., 26 App. Div. 507, 275 N.Y.S.2d 863 (1966); Tom Hicks Transfer Co. v. Ford, Bacon & Davis Texas, Inc., 482 S.W.2d 364 (Tex. Civ. App. 1972), are all "double payment" cases based upon substantially identical facts as presented in the Admiral case. Each case involved a situation where the carrier represented to the consignee in the bill of lading that the freight charges had been prepaid and the

consignee relied upon that representation in reimbursing the freight charges to the consignor. The estoppel defense equitably prevented the possibility of the consignee being required to pay the freight charges a second time.

In this case, the consignor has not yet paid any of the freight charges for which it was contractually obligated under Section 7 of the bills of lading. Clearly, the "double payment" cases are consistent with, but distinguishable from, the decision in this case. In fact, the Washington State Court of Appeals carefully distinguished the "double payment" line of cases, noting that the defense of estoppel had been proven in those cases by proof of reliance on the carrier's representation. In this case, there was no proof of reliance by the shipper on any representation or action of the carrier. 30 Wn. App. at

148, 133 P.2d 104, App. at A-10 to A-12. As the Washington court reasoned, there is certainly no conflict between the double payment cases and the decision it made in this case.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

AIKEN, ST. LOUIS & SILJEG

By: _____
GEORGE S. MARTIN
Attorneys for Respondent

DATED: February 26, 1982.